

STATE OF MICHIGAN
COURT OF APPEALS

TAMMY JEAN WARD,

Plaintiff-Appellant,

v

RONNIE RICHARD WARD,

Defendant-Appellee.

UNPUBLISHED

August 9, 2002

No. 236514

Berrien Circuit Court

LC No. 1999-002097-DM

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant physical custody of the parties' children. We affirm.

The parties married in 1990 and were divorced in 2001. This marriage had been plaintiff's third, and defendant's second. Pursuant to the divorce decree, defendant was awarded primary physical custody of the parties' children. Plaintiff wishes to obtain primary physical custody of the children. It is on this basis that plaintiff now appeals.

Plaintiff filed for divorce, obtained temporary custody of the children and moved from the family home in Ypsilanti to Niles in August 1999. Upon moving to Niles, plaintiff voluntarily relinquished custody of her two children from a prior marriage. Plaintiff also has a fifth child, born on July 14, 2000, as the result of an adulterous affair with her first cousin. At the time of trial, plaintiff intended to marry her cousin in a state that recognizes such marriages. Defendant, on the other hand, remained in Ypsilanti and at the time of trial was not romantically involved. We also note that there is no evidence on the record reflecting emotional, behavioral or psychological problems on the part of the children.

On appeal, plaintiff alleges that the trial court lacked the requisite clear and convincing evidence for its determination that it was in the children's best interest to change the established custodial environment from that of plaintiff to defendant. Specifically, plaintiff argues that the trial court erred in its determination that factors (b), (c), (d), (e), (f), (h) and (j) weighed in favor of defendant. Plaintiff also argues that factors (g) and (k) weighed in her favor, and that the trial court erred in finding them to weigh equally between the parties.

Custody disputes are to be resolved in the child's best interest, as measured by the eleven factors set forth in the Child Custody Act. MCL 722.23; *Eldred v Ziny*, 246 Mich App 142, 150;

631 NW2d 748 (2001). The purpose of the Child Custody Act is to promote the best interest of the child, and is to be liberally construed in that respect. *Frame v Nehls*, 452 Mich 171, 176; 550 NW2d 739 (1996). Where there is an established custodial environment, as there was in this case, the child's best interest must be proven by clear and convincing evidence. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). The burden of proof is on the party seeking the change. *Id.* Also, a trial court's findings as to each child custody best interest factor should be affirmed unless the evidence "clearly preponderates in the opposite direction." *Id.* at 20.

A court need not give equal weight to all best interest factors, but may take into consideration the relative weight of the factors when appropriate. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998). Additionally, it should be noted that a single circumstance can be relevant to, and considered in the determination of, more than one best interest factor. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 25-26; 581 NW2d 11 (1998). Also, a trial court is granted "extremely broad powers in child custody cases." *Longhi v Longhi*, 119 Mich App 41, 43; 325 NW2d 617 (1982).

At the outset, we acknowledge the existence of conflicting testimony between the parties on the record; however, the trial court specifically noted these conflicts. Giving proper deference to the trial court's assessment of witness credibility, we are confident that the trial court considered these discrepancies and formed its factual determinations accordingly.

First, plaintiff challenges the trial court's finding in favor of defendant with respect to factor (b), "the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." However, the record contains evidence supporting defendant's ability to provide the elements composing this factor. It is not disputed that defendant loves his children and that they love him in return. Also, defendant willingly participated in and supported the children's education and involvement in religion. Furthermore, there is evidence on the record substantiating the trial court's concerns with regard to plaintiff's history of progressively evading involvement with her children from a previous marriage. Therefore, the trial court's conclusion with regard to factor (b) was not against the great weight of the evidence.

Plaintiff also contends that the trial court erred in its conclusion that factor (c), "the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs," favored defendant. The trial court did acknowledge plaintiff's ability to secure a job, but also pointed out that plaintiff was dependent on her fiancé for her income, rent and automobile, while defendant was securely and independently employed. Furthermore, defendant exhibited the tendency for long-term employment and earning potential, having at one point earned in excess of \$43,000 annually. Therefore, it cannot be said that the trial court's findings in relation to this factor were against the great weight of the evidence.

Plaintiff further alleges that the trial court erred in concluding factor (d), "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," weighed in defendant's favor. Specifically, plaintiff cites in her favor the fact that she had been the children's predominant caregiver since their birth and that neither child

exhibited any form of emotional problems. Plaintiff also maintains in her favor that there was “stability” in her relationship with her fiancé.

Again, however, there was substantial evidence on the record in support of defendant’s ability to provide a more stable and satisfactory environment than plaintiff. Defendant indicated his intention to remain in the marital home and was not romantically involved. [Conversely, there existed a pattern of disruption in plaintiff’s environment. She uprooted her children from their home, father and extended families to move across the state. She intended to marry her fiancé, which would be her fourth marriage in a period of sixteen years. These are indications of at least some degree of instability.] Accordingly, the trial court’s findings with regard to this factor are not contrary to the great weight of the evidence.

Also, plaintiff insists the trial court erred in finding that factor (e), “the permanence, as a family unit, of the existing or proposed custodial homes,” weighed in favor of defendant. Specifically, plaintiff insists that “the children were in a loving, nurturing environment” while in her home. Plaintiff also alleges that defendant was “upside down” economically. Nevertheless, it is not disputed that plaintiff intends to remarry in the near future, which would require the children to adjust to yet another family dynamic. The record also reflects that, unlike plaintiff, defendant is currently uninvolved romantically. Moreover, as noted, defendant intends to reside in the marital home. On the basis of the foregoing, it cannot be said that the evidence clearly preponderates in the direction opposite of the trial court’s ruling with regard to this factor.

Plaintiff also maintains that the trial court erred in concluding that factor (f), “the moral fitness of the parties involved,” weighed in favor of defendant. Defendant had a record of drunk driving and imprisonment, but the record reflects that defendant has not consumed alcohol since his incarceration, which was before the parties were married over ten years ago. On the other hand, it is undisputed that plaintiff had recently engaged in an adulterous affair with her first cousin, resulting in the birth of a child during her marriage to defendant. Therefore, it cannot be said that the trial court’s conclusion as to factor (f) was contrary to the great weight of the evidence.

Plaintiff also takes issue with the trial court’s award of factor (g), “the mental and physical health of the parties involved,” to defendant. While the former existence of defendant’s depression is undisputed, evidence on the record relied on by the trial court strongly indicated defendant’s depression was either under control or nonexistent. Also, there was evidence as to plaintiff’s propensity toward what the trial court cited as “untruthfulness,” such as plaintiff lied in prior court proceedings. Accordingly, because the record supports the trial court’s findings of fact and conclusion with regard to factor (g), it cannot be said that the evidence clearly preponderates in the opposite direction of the trial court’s ruling on factor (g).

Plaintiff further claims that “the home, school, and community record of the child,” factor (h), should have been weighed in her favor, as opposed to equally between the parties. In making this claim, plaintiff insists again that the children had been thriving in her home as well as excelling academically. The trial court acknowledged plaintiff’s involvement in the children’s education, but also noted the fact that despite the distance, defendant was also actively involved. This determination was based on defendant’s record for attending various school functions and conferences. Therefore, the trial court’s determination was not against the great weight of the evidence.

In relation to factor (j), “the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents,” plaintiff alleges that the trial court erred in its conclusion that this factor weighed in favor of defendant. However, the record indicated that plaintiff had repeatedly disrupted defendant’s regularly scheduled telephone visits with the children and repeatedly attempted to frustrate defendant’s efforts to spend time with the children. There was no evidence of similar behavior on the part of defendant. Because the evidence does not clearly preponderate to the contrary, the trial court correctly analyzed this factor.

Plaintiff also insists that the trial court erred in concluding that factor (k), addressing “domestic violence, regardless of whether the violence was directed against or witnessed by the child,” should be weighed equally. The trial court determined plaintiff’s claims of domestic assault to be unfounded. Giving proper deference to its determinations as to credibility and because there is no other evidence of such action, the record supports the trial court’s conclusion.

Finally, plaintiff argues that the trial court incorrectly weighed factor (l), addressing “any other factor considered by the court to be relevant to a particular child custody dispute,” in defendant’s favor. The trial court gave defendant credit in this category for his “exceptional efforts to be supportive” in the lives of plaintiff’s children from her first marriage and his continued attempts to facilitate the relationship between all of her children. Such actions on the part of defendant are undisputed.

The trial court also concluded that plaintiff “has no appreciation whatsoever for any patterns that have been established, the impact on her children, demonstration of less than a stellar decision making process and parenting skills in the future [, the] focus shifts away from her to pointing the finger at someone else in terms of responsibility.” We find that this conclusion is supported by the record. Because there is no evidence preponderating against these assertions, or the trial court’s ultimate ruling with respect to factor (l), it cannot be said that the trial court’s determination was in error.

In this case, it is undisputed that an established custodial environment had existed with plaintiff. The trial court found that seven factors weighed in favor of defendant and the remaining factors were equally weighed. We have concluded that none of these determinations were against the great weight of the evidence. Accordingly, we hold that the trial court did not commit an abuse of discretion in determining that clear and convincing evidence existed to warrant a change of physical custody from plaintiff to defendant.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder